Today, Hon. David Norton of the Federal District Court for the District of South Carolina (an appointee of George H. W. Bush) issued a nationwide injunction barring the implementation of the so-called "Suspension Rule" that effectively rescinded the Waters of the United States Rule (also called the WOTUS Rule or the Clean Water Rule) previously issued under the Obama administration. This decision, which ensures that the federal government retains authority to keep land development and other activities from interfering with wetlands and rivers, is a victory not only for the environment, but for the rule of law.

I've blogged previously about this rule suspension, and about various ways it seems to be on shaky legal ground, so I won't repeat the context here. [Update: Jonathan Adler at the Volokh Conspiracy blog has posted a good summary of how we got where we are; Jonathan is less sympathetic to the Obama-era rule on the merits than I am, but he seems to agree that the Administration's cursory approach to suspending that rule was inappropriate.] The prevailing argument here against EPA is one I didn't even discuss directly in my prior analysis: that the agencies inappropriately suspended the rule because they failed to solicit any public comment on the merits of the existing rule or its suspension. The court held that because the legal effect of the Suspension Rule is to change the definition of "waters of the United States," the agency couldn't lawfully suspect the prior rule without engaging with the substantive impacts of that change. The court is surely correct.

From the court's opinion:

> … when an agency refuses to consider comments on a rule's substance and merits in issuing a suspension rule that reinstates an earlier regulation, the content restriction is "so severe in scope" that "by preventing any discussion of the 'substance or merits' of either set of regulations" the opportunity for comment "cannot be said to have been a 'a meaningful opportunity." N.C. Growers' Ass'n, 702 F.3d at 770. Here, the Suspension Rule explicitly restricted public comments to "whether it [was] desirable and appropriate to add an applicability date" to the WOTUS rule and whether the two-year delay in implementing what would be an ultimately revised definition of the "waters of the United States" should be "shorter or longer." The text of the proposed rule and the EPA Memorandum for the Record on Suspension Rule Rulemaking Process make clear that the agencies did not solicit any comments on the merits of the WOTUS rule or the merits of the 1980s regulation before issuing the Suspension Rule. The agencies refused to engage in a substantive reevaluation of the definition of the "waters of the United States" even though the legal effect of the Suspension Rule is that the definition of "waters of the United States" ceases to

be the definition under the WOTUS rule and reverts to the definition under the 1980s regulation. The definition of "waters of the United States" is drastically different under these two regulations. Environmental plaintiffs point to a string of recent cases where the courts have set aside similarly hastily enacted rules:

> Clean Air Council v. Pruitt, 862 F.3d 1, 9 (D.C. Cir. 2017) (vacating the EPA's attempt to temporarily stay a Clean Air Act regulation without "comply[ing] with the … APA …, including its requirements for notice and comment"); Open Communities All. v. Carson, 286 F. Supp. 3d 148, 152 (D.D.C. Dec. 23, 2017) (enjoining the defendant agency's attempt, "without notice and comment or particularized evidentiary findings, … [to] delay[] almost entirely by two years implementation of a rule" adopted by the previous administration); Pennsylvania v. Trump, 281 F. Supp. 3d 553, *1, *9–10 (E.D. Pa. Dec. 15, 2017) (enjoining two new "Interim Final Rules" based on the defendant agencies' attempt to "bypass notice and comment rule making"); Nat'l Venture Capital Ass'n v. Duke, 291 F. Supp. 3d 5, 8 (D.D.C. Dec. 1, 2017) (vacating the defendant agency's "decision to delay the implementation of an Obama-era immigration rule … without providing notice or soliciting comment from the public"); California v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d 1106, 1111, 1120 (N.D. Cal. Oct. 4, 2017) (holding that the defendant agency's attempt to postpone a regulation's compliance dates "after the rule's effective date had already passed … violated the APA's notice and comment requirements by effectively repealing the [r]ule without engaging in the process for obtaining comment from the public"); Becerra v. U.S. Dep't of the Interior, 276 F. Supp. 3d 953, 966 (N.D. Cal. Aug. 30, 2017) (holding that the defendant agency violated the APA in "fail[ing] to give the public an opportunity to weigh in with comments" before attempting to postpone a rule that had already taken effect).

ECF No. 60 at 2–3. The government argues that the Suspension Rule is distinguishable from these cases because in those cases the agency undertook a "delay, suspen[sion], or otherwise [change]" in regulations during reconsideration without engaging in notice and comment rule making, whereas here the agencies conducted notice and comment rule making. ECF No. 62 at 23. But it is the agencies' decision to promulgate the Suspension Rule without allowing the public to comment on the substance of either the WOTUS Rule or the 1980s regulation that renders the notice-and-comment rule making infirm under the APA. An illusory opportunity to comment is no opportunity at all.

The decision reinstates the Obama-era rule in 26 states (prior court injunctions have blocked the rule's implementation in other states). As the court's opinion indicates, this is one in a string of cases against federal agencies in the Trump administration that have succeeded because the administration has failed to follow basic processes required by federal law. The administration's contempt for the rule of law is on full display once again here, thwarted by a conservative judge, and based on the advocacy of watchdog environmental advocacy groups. While having judges and advocates keep the administration in check is important, it would be far better to have a government that followed the law.